

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL SUIT NO. 2 OF 2023 (OS)

PATEL **MWANZOU**
.....**APPLICANT**

VERSUS

CAROLINE MWENDE PATEL..... **1ST**
RESPONDENT

NOIDA EXCEL INTERNATIONAL LTD.....**2ND RESPONDENT**

TALEMACY INVESTMENTS LTD..... **3RD RESPONDENT**

THE REGISTRAR OF LANDS, KILIFI..... **4TH**
RESPONDENT

JUDGMENT

1. By his “Re-amended” Originating Summons dated 28.8.24, the Applicant seeks multiple orders. Some are spent. The unresolved prayers are:

4. ***THAT this Honourable Court makes a declaration that the suit properties herein, Title Number: MAGHARNI/BUNGALE/1420, Title Number: MAGHARNI/BUNGALE/1421 and Title Number: MAGHARNI/BUNGALE/1422 were registered in the name of the 1st Respondent who was at all material times holding the same in trust for the Applicant and/or as matrimonial properties.***
5. ***THAT costs be provided for.***
6. ***THAT this Honourable Court makes a declaration that the fraudulent transfer of the matrimonial property, being Title Number: MAGHARNI/BUNGALE/1420, in the name of to the 2nd Respondent was/is unlawful, null and void and that this Court does make an order cancelling both the transfer and title deed issued to the 2nd Respondent in respect thereof.***
7. ***THAT this Honourable Court makes a declaration that the fraudulent transfer of the matrimonial properties, being Title Number: MAGHARNI/BUNGALE/1421 and Title Number: MAGHARNI/BUNGALE/1422, in the name of to the 3rd Respondent is unlawful null and void and that this Court does make an order cancelling both the transfers and title deeds issued to the 3rd Respondent in respect thereof.***

2. The Applicant's case is that he has been married to the 1st Respondent since 1994. The marriage was celebrated under Kamba customary law in Matiliku sublocation, Makueni County. They were blessed with 6 children namely Mueni Patel, Mwendwa Patel, Kelvin Patel, Cecilia Patel, Eliazar Patel and Ndunge Patel.
3. The Applicant claims that in 2014, he identified a 200 acre piece of land belonging to one Samson Randu Nzai from whom he purchased a total of 257 acres. He paid for the same in instalments of Kshs. 12,000/= on 22.3.14; Kshs. 44,000/= on 9.4.14; Kshs. 44,000/= and Kshs. 393,000/= on 29.4.14; Kshs. 386,000/= on 30.4.14 and Kshs. 535,000/= on 26.7.15.
4. The Applicant further stated that he later came to learn that the 1st Respondent had fraudulently transferred the property known as Magharni/Bungale/1420 (Plot 1420) to the 2nd Respondent, and Title Number Magharni/Bungale/1421 (Plot 1421) and Title Number Magharni/Bungale/1422 (Plot 1422) to the 3rd Respondent. Further, that the said transfers were done fraudulently without first seeking and obtaining his spousal consent as required by law, and that the 1st Respondent executed a fraudulent non-spousal affidavit. Additionally, that Plots 1421 and 1422 were transferred despite a caution existing on both properties.
5. The Applicant stated that the said properties are owned by the 1st Respondent in her name on behalf of the family but that he solely purchased the same for the benefit of their 6 children.
6. The OS is opposed by the Respondents in their affidavits.
7. The 1st Respondent accused the Applicant of coming to Court with unclean hands. She stated that she and the Applicant purchased 7 parcels of land from proceeds of their business enterprise and mutually agreed that she gets 3 parcels while the Applicant gets 4 parcels. The 4 parcels in the Applicant's name are Magharini/Bungale/1417, 1418, 1419 and 1445.
8. The 1st Respondent denied that she and the Applicant are legally married but conceded that they have had a long-time relationship and were blessed with 6 children; that even if they were married under Kamba Customary law, then the law requires the same to be registered with the Registrar of Marriages as legal and binding proof of the same. As such, the Applicant cannot make a claim for matrimonial properties.
9. The 1st Respondent further admitted having sold Plot 1420 to the 2nd Respondent and Plots 1421 and 1422 to the 3rd Respondent but stated that she did not require the Applicant's consent. Further that the proceeds of sale were utilised for her daughters' rent and school fees and family upkeep. She denied knowledge of any caution against the properties. She further

stated that the present Application is overtaken by events as the transfer of the properties was completed way before the suit was filed. She urged that the suit be dismissed with costs.

10. The 2nd and 3rd Respondents denied the allegations of fraud and asserted that pursuant to respective agreements for sale, they paid the entire purchase price to the 1st Respondent upon the transfer of the properties. Further that they conducted a search on the properties and confirmed that the same were registered in the name of the 1st Respondent and had nil encumbrances. Additionally, there was no indication on the titles or green cards that the properties were held by the 1st Respondent in trust for any party. They urged that the OS be dismissed with costs.
11. I have considered the OS, the rival affidavits and submissions filed the parties. The issues that fall for determination are:
 - i) Whether this Court has jurisdiction to entertain this suit.
 - ii) Whether the Applicant and 1st Respondent are husband and wife.
 - iii) Whether the suit properties are matrimonial property.
 - iv) Whether the transfer of the suit properties to the 2nd and 3rd Respondents was unlawful, null and void.
 - v) Whether the Applicant is entitled to the orders sought.

Whether this Court has jurisdiction to entertain this suit

12. The Respondents raised a preliminary issue on jurisdiction. In their submissions, the Respondents contend that the prayers sought in the OS fall within the jurisdiction of the Environment and Land Court. As such, this Court lacks jurisdiction to order cancellation of the titles to the suit properties.
13. The question as to whether this Court has jurisdiction to deal with this matter, it must first be determined whether there was a marriage between the Applicant and the 1st Respondent. The 2 issues will thus be considered together.
14. The Applicant contends that he paid dowry and that they are legally married having celebrated their marriage under Kamba customary law in Matiliku sublocation, Makueni County. The 1st Respondent denies that she is the Applicant's wife as he has never paid dowry.
15. It is well settled that a party who seeks to propound customary law, must call evidence to prove that customary law. In **Sakina Sote Kaitany & another v Mary Wamaita [1995] eKLR**, Gicheru, JA. (as he then was) had this to say concerning proof of customary law and practices:

[T]he onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case... As a matter of necessity the customary law must accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.

16. The Applicant did not bring in an expert of Kamba customary law to support his claim that a customary marriage took place between him and the 1st Respondent. In any event no marriage certificate issued under Section 55 of the Marriage Act was exhibited. My inevitable finding therefore is that no marriage under Kamba customary law took place between the Applicant and the 1st Respondent as alleged.
17. Having so found, can the Court presume a marriage between the Applicant and the 1st Respondent. The Applicant has urged the Court to presume such a marriage.
18. The statutory basis of the doctrine of presumption of marriage is contained in section 119 of the Evidence Act which provides:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

19. Our courts have presumed the existence of a marriage between parties due to long cohabitation and other circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The principle of presumption of marriage was laid down in **Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi CACA No. 13 of 1976** the *locus classicus*, where Mustafa JA held:

But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the

contrary can rebut such a presumption, see re: Taplin - Watson v Tate (1937) 3 ALLER 105.

20. In the case of **MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment)**, the Supreme Court had occasion to consider the concept of presumption of marriage and set out the parameters in relation thereto as follows:

[64] We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

- 1. The parties must have lived together for a long period of time.*
- 2. The parties must have the legal right or capacity to marry.*
- 3. The parties must have intended to marry.*
- 4. There must be consent by both parties.*
- 5. The parties must have held themselves out to the outside world as being a married couple.*
- 6. The onus of proving the presumption is on the party who alleges it.*
- 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.*
- 8. The standard of proof is on a balance of probabilities.*

21. The undisputed evidence shows that the parties lived together for 29 years from 1993 to 2022 and had 6 children. In her testimony, the 1st Respondent stated that she met the Applicant in 1993 when she was 18 years old. He told her he would marry her and they started living together. She stated that she saw in the Applicant a good and trustworthy man. She further stated that they lived together for all those years, knowing that he would marry her.

22. Applying the test in the **MNK v POM** case (supra) to the evidence adduced, it is clear to the Court that the 1st Respondent lived together with the Applicant as a wife. Little wonder then that as per her testimony, she took on the Applicant's name in her national identity card. Additionally, during this long period of cohabitation, the parties had 6 children all of whom took on the Applicant's name. The parties engaged in family life and family business together. The 1st Respondent stated that the Applicant later abandoned her and the children and went to live with another woman. All this to the mind of the Court sounds like the testimony of a wife.

23. Although the 1st Respondent denies being married to the Applicant, her testimony does not align with this denial. She adduced no evidence to rebut the presumption of marriage between her and the Applicant. If anything, her evidence buttresses the presumption.

24. In view of the foregoing, the Court finds that this is a proper case to presume a marriage between the Applicant and the 1st Respondent and the Court hereby presumes a marriage between them. Having so found, it follows that this Court has the requisite jurisdiction to inquire as to whether the suit properties are matrimonial properties under the Matrimonial Property Act, the object of which is to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

Whether the suit properties are matrimonial property and whether the transfer thereof to the 2nd and 3rd Respondents was unlawful, null and void

25. Due to their conceptual similarities, these 2 issues will be considered together. The core complaint of the Applicant is that the suit properties were transferred by the 1st Respondent without his consent despite the same being matrimonial properties.

26. In order to determine whether the consent of the Applicant was required in the transfer of the suit properties by the 1st Respondent to the 2nd and 3rd Respondents, it is necessary to first establish whether the same constitute matrimonial property.

27. Section 6 of the Matrimonial Property Act (MPA) defines matrimonial property as follows:

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

28. For any property to be said to be matrimonial property under the MPA, it must be the matrimonial home or homes of spouses, household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of marriage also constitutes matrimonial property.

29. Section 93 of the Land Registration Act (LRA) provides:

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act (Cap. 152).

30. Section 93 of the LRA provides that ***an interest in land obtained by a spouse during the subsistence of a marriage for the co-ownership and use of the spouses or all spouses shall be deemed to be matrimonial property.*** (emphasis). It is noted that for such interest in land to constitute matrimonial property, it must be obtained during the subsistence of the marriage; it must be for the co-ownership and use of spouses. Further, this provision will not obtain if there is any written law to the contrary. Co-ownership is defined in Section 91(1) as the ownership of land by two or more persons and includes joint tenancy or tenancy in common.
31. Flowing from the cited provisions of the MPA and LRA, it is quite clear that acquisition of property during the subsistence of marriage and co-ownership of property by spouses is a key ingredient to what constitutes matrimonial property.
32. Section 12 of the MPA provides as follows:
- An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.***
33. The law is that a matrimonial property shall not during the subsistence of a marriage be sold, gifted, leased, mortgaged or otherwise alienated, without the consent of both spouses. A spouse who intends to dispose of a matrimonial property in whatever manner must first obtain spousal consent. There is however, no legal requirement that property that is not matrimonial property would require spousal consent before it can be dealt with by the registered owner.
34. From the evidence and documents on record, the suit properties do not constitute the matrimonial home or homes of the Applicant and the 1st Respondent. While they were acquired during the subsistence of their marriage, the same were not jointly owned. Applying the provisions in both the LRA and the MPA, to the circumstances herein, I find and hold that the suit properties are not matrimonial property.
35. Having found as I have, that the suit properties were not matrimonial property, it follows that by dint of Section 12 of the MPA, the 1st Respondent did not require the consent of the Applicant to dispose of the suit properties. Accordingly, the transfer of the suit properties by the 1st Respondent to the 2nd and 3rd Respondents without the Applicant's consent is not and cannot be illegal as alleged.
36. Where property is acquired during the marriage, Section 14 of the Act provides certain rebuttable presumptions as follows:

Where matrimonial property is acquired during marriage—

- (a) *in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and*
- (b) *in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.*

37. The Applicant contends that he purchased the suit properties solely and had them registered in the name of the 1st Respondent in trust for himself and the family. On her part, the 1st Respondent asserts that they purchased 7 properties from proceeds of their restaurant business and mutually agreed that she gets 3 parcels while the Applicant gets 4 parcels. The Applicant however denies this and contends that all 7 parcels were purchased by him through his own funds and a loan of 500,000/= from friends and an additional Kshs. 100,000/= from friends to purchase the land. He stated that he holds the 4 parcels in trust for his children.
38. The Court has looked at the agreements exhibited by the Applicant as evidence that he is the one who solely purchased the properties. The agreements indicate that Samson Nzai Randu received money from the Applicant for land. The details of the land are however not indicated and it is not possible to tell which land the Applicant was purchasing *vide* the said agreements. Further, although in his testimony, the Applicant stated that he purchased the land from several people, the exhibited the agreements only indicate Samson Nzai Randu as the vendor. Additionally, the Applicant did not produce any loan agreement nor indeed the names of the friends who advanced money to him. Without producing any evidence to support these assertions, they remain unsubstantiated.
39. It is trite law that he who asserts must prove. Section 107 of the Evidence Act stipulates:
- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
 - (2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
40. The Applicant was obligated to place before this Court, cogent evidence to support his claim that he is the one who solely purchased the suit properties and that he had the same registered to the 1st Respondent to hold in trust for the family. It is not disputed that during the subsistence of the parties' cohabitation, 7 properties were purchased, 4 of which were registered in the name of the Applicant and 3 in the name of the 1st Respondent. Any presumption that is to be made by the Court under Section 14 of MPA, must be based on evidence. Without discharging the burden of proof placed upon him, to demonstrate that the 3

suit properties were registered in the name of the 1st Respondent in trust for the Applicant and the children, the 1st Respondent was able to rebut the presumption.

41. The Applicant contends that upon realising that the 1st Respondent was negotiating the sale of Plots 1421 and 1422 after selling Plot 1420, he registered a caution against the 2 parcels to stop further transaction. The Applicant's claim against the 4th Respondent is that despite the caution, the transfers of the said 2 parcels were registered in favour of the 3rd Respondent.
42. I have looked at the exhibited documents. What the Applicant refers to as cautions dated 25.4.23 are actually applications for registration of the cautions. The certificates of official search dated 26.4.23 indicate that the cautions were pending registration. The Applicant stated that he did not pursue the same.
43. In his testimony, the Lands Registrar Mohamed Billow stated that there was an application for caution that was pencil noted as pending in the green card and was awaiting approval. The cautions were however rejected and no entries were made for registration of the cautions. He stated that transfer of all the suit properties was done overboard.
44. Having considered the testimony of the Land Registrar and noting that the cautions were not registered, I find the claim against the Land Registrar unmerited. Further, nothing turns on the claim by the Applicant that no reason was given for ejection of the caution.

Whether the Applicant is entitled to the orders sought

45. The Applicant's claim that the transfer of the suit properties by the 1st Respondent to the 2nd and 3rd Respondents is illegal, null and void, is predicated on the assumption that the same were matrimonial property and that spousal consent was required. The Court has found that the properties are not matrimonial property and that spousal consent was not required. Further, that there was no caution registered against the titles. Accordingly, the transfer of the suit properties by the 1st Respondent to the 2nd and 3rd Respondents, without the Applicant's consent, was not illegal as alleged and she transferred good title to them.
46. Upon registration of the transfers in their favour and issuance of titles in their names, the 2nd and 3rd Respondents became the indefeasible owners of their respective properties under Section 26(1) of the LRA which provides:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and

conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

47. In light of the finding of the Court, the claim must fail. Accordingly, the Applicant is not entitled to the orders sought herein.

48. In the end, after taking into consideration the totality of the evidence and the applicable law as analysed herein, I find that the OS lacks merit and the same is dismissed with costs to the 2nd and 3rd Respondents. Given the past relationship between the Applicant and the 1st Respondent, there shall be no award of costs to the 1st Respondent.

DATED, SIGNED and DELIVERED in MALINDI this 27th day of February, 2026

M. THANDE
JUDGE